(2)

No. 89-1947

In The

Supreme Court of the United States

October Term, 1989

JOHN REMINGTON GRAHAM,

Petitioner,

vs.

WILLIAM J. WERNZ, DIRECTOR OF THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY FOR THE STATE OF MINNESOTA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Minnesota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Court have jurisdiction pursuant to 28 U.S.C. § 1257 to hear Petitioner's claims of absolute immunity, qualified immunity and defective charging language where he failed to perfect review of the referee's conclusions in the Minnesota Supreme Court?

2. Should this Court consider whether a subjective standard of determining reckless disregard of truth or falsity is required by the first amendment of the U.S. Constitution in attorney discipline proceedings, where there is no conflict among state or federal appellate courts and where such a holding would not affect the outcome of the case?

PARTIES TO THE PROCEEDING

Petitioner: John Remington Graham is an attorney licensed to practice law in the State of Minnesota and was denominated Respondent in the proceedings below.

Respondent: William Wernz is director of the Office of Lawyers Professional Responsibility, the agency established by the Minnesota Supreme Court to investigate allegations of attorney misconduct and impairment and to prosecute disciplinary proceedings when warranted.

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REPORT OF THE OPINION BELOW

The opinion below is reported at 453 N.W.2d 313 (Minn. 1990), *sub nom. In re Disciplinary Action Against Graham*, and is reproduced in Petitioner's Appendix at A1 through A43 (hereinafter "Pet. A.").

CONSTITUTIONAL PROVISIONS AND REGULATIONS

The applicable provisions of the United States Constitution are the first and fourteenth amendments. The pertinent clauses are set forth in the Petition for Writ of Certiorari. Petition for Writ of Certiorari at 2-3 (hereinafter "Pet.").

The applicable regulations include both disciplinary rules from the Minnesota Rules of Professional Conduct (hereinafter "MRPC") and procedural rules from the Minnesota Rules on Lawyers Professional Responsibility (hereinafter "RLPR").

Disciplinary rules. Minnesota Rule of Professional Conduct 3.1 provides in relevant part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . .

Rule 8.2(a), MRPC, provides:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Rule 8.4(d), MRPC, provides:

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (d) engage in conduct that is prejudicial to the administration of justice[.]

Procedural rules. Minnesota Rule on Lawyers Professional Responsibility 14 provides in relevant part:

> (a) Referee. This Court may appoint a referee with directions to hear and report the evidence submitted for or against the petition for disciplinary action.
>
> (b) Conduct of hearing before referee. Unless this Court otherwise directs, the hearing shall be conducted in accordance with the rules of civil procedure applicable to district courts and the referee shall have all the powers of a district court judge.
>
> * * *
>
> (e) Referee's findings, conclusions, and recommendations. The referee shall make findings of fact, conclusions, and recommendations, file them with this Court, and notify the respondent and Director of them. Unless the respondent or Director, within ten days, orders a transcript and so notifies this Court, the findings of fact and conclusions shall be conclusive. . . .

STATEMENT OF THE CASE

Petitioner seeks review of a decision of the Minnesota Supreme Court suspending him from the practice of law for 60 days and requiring him to pay $750 in costs and

complete the professional responsibility portion of the state bar examination within one year. *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 325 (Minn. 1990); Pet. A37-A38. This discipline was based on a referee's report that Petitioner's allegations that a federal magistrate, a state judge, a county attorney, a private attorney, and "others" had conspired to fix a federal case were false, without basis in fact, and recklessly made, in violation of Rules 3.1, 8.2(a) and 8.4(d), MRPC, and based upon Petitioner's failure to perfect review of these findings and conclusions in the Minnesota Supreme Court.

Petitioner John Remington Graham stated under oath, and "of his certain knowledge," that Minnesota District Court Judge John Spellacy, United States Magistrate John McNulty, Crow Wing County Attorney Stephen Rathke, Rathke's attorney Michael Milligan, and "others" conspired between December 9 and 11, 1987 to fix the federal case *Shockman v. Rathke*. Petitioner represented Shockman in that case, an action to enjoin criminal prosecution, which was decided in Rathke's favor by Magistrate McNulty in January 1988.

Petitioner made his allegations in February and March 1988, in somewhat differing language, in 1) a letter to the United States Attorney; 2) a complaint of judicial misconduct against Magistrate McNulty; and 3) an affidavit filed in federal court in connection with a motion for Magistrate McNulty to disqualify himself from considering whether attorney's fees should be awarded against Petitioner in the *Shockman v. Rathke* matter.

Petitioner kept what he termed a "log," a personal record of the events surrounding the *Shockman v. Rathke*

case. He testified that his "log" contained evidence supporting every allegation he made. The referee found that "Other than what [Bruce] Alderman told [Graham] of what he believed he heard on December 11, the log does not contain any evidence of a conspiracy." Finding 37, Resp. A11-A12.

Alderman, a Brainerd attorney, had told Graham in January of 1988 of a conversation he had at a bar association Christmas party on December 11, 1987. The conversation was with one of County Attorney Rathke's law partners, but Alderman was unsure which one. Findings 28-36, Resp. A9-A11. Alderman regarded the conversation as "loose party talk." Finding 31, Resp. A10. The referee found that "at best, Respondent took a scrap of cocktail party conversation and extrapolated it to form an unsubstantiated hypothesis." General findings, Pet. A44. Alderman understood Rathke's partner to make a statement:

> [T]o the effect that Milligan had telephoned another person who in turn called the judge in Duluth and that 'everything had been taken care of,' 'was in the bag,' or words to that effect.

Finding 30, Resp. A9-A10. Alderman did not hear either Rathke's or Spellacy's name mentioned and indeed told Graham, "[A]s far as I was concerned, he [Spellacy] was not involved." Finding 36, Resp. A11. The wife of one of Rathke's law partners, seated near Alderman during a discussion with her husband about the *Shockman* case, did not hear any such conversation. She did, however, hear her husband make a statement:

> [T]o the effect that Graham was becoming more paranoid and the next thing he might do is claim there is a fix in with the judge.

Finding 32, Resp. A10.

Petitioner's complaints and affidavit did not report the conversation as repeated to him by Alderman. Instead, he authored passages such as the following, contained in his letter of complaint to the U.S. Attorney:

> I allege that, at some time between December 9 and 14, 1987, Michael Milligan, a lawyer practicing in St. Cloud, then representing Stephen Rathke, the Crow Wing County Attorney, contacted John Spellacy, a state district judge living in Grand Rapids, and, in consequence of the ensuing conversation, Judge Spellacy contacted Patrick J. McNulty, a federal magistrate in Duluth, and then and there corruptly secured a commitment from Judge McNulty to decide the pending case of Shockman v. Rathke, No. CV-5-87-260, without regard to the law and the facts, and, between January 4 and 21, 1988, Judge McNulty carried out his commitment, all of which was done with the knowledge and consent, and at the request of Mr. Rathke. Political connections were the modus operandi of these crimes.

Pet. A49-A50. In his sworn complaint against Magistrate McNulty, Petitioner wrote:

> Specifically, it can be proved with direct and circumstantial evidence that Michael Milligan, a lawyer in the Quinlivan Law Firm in St. Cloud, Minnesota, acting as counsel for and with the knowledge and consent of Mr. Rathke and certain others, contacted Hon. John Spellacy, a state district judge living in Grand Rapids, Minnesota, at some point between December 9 and 11, 1987, - - that Mr. Milligan and Judge Spellacy then and there agreed upon a plan whereby Judge Spellacy would contact Judge McNulty, by making prejudicial remarks about the suit and counsel bringing it for the plaintiffs, to decide the case in the manner alleged, - - that

> Judge Spellacy then contacted Judge McNulty, and extracted from him a commitment to decide the case in the manner alleged, – and that Judge McNulty carried out a substantial part of his commitment between January 4 and 21, 1988. . . .

Pet. A56-A57. In his federal court affidavit requesting that Magistrate McNulty recuse himself, Petitioner wrote under oath:

> On the basis of evidence within my possession and called to my attention by responsible citizens I state of certain knowledge that the following events have occurred, to wit:
>
> Within seventy-two hours of the opening of business on December 9, 1987, Michael Milligan acting as counsel for the defendant, contacted a certain state district judge whose identify [sic] is known to me. The said state district judge in response to the request of Mr. Milligan contacted the said Judge McNulty and secured from him a commitment to decide his case against the plaintiffs and additionally to assess attorney's fees against me. All of this was done with the knowledge and consent of Mr. Rathke and certain other persons. A commitment by the said Judge McNulty was accordingly made fully three weeks before the beginning of trial on January 4, 1988.

Pet. A61.

Petitioner thus combined Alderman's report with his own utterly unsupported speculations to allege, "of certain knowledge," that Spellacy, Rathke, and "others" later named as including certain of Rathke's and Milligan's law partners, conspired with Milligan and McNulty to fix the *Shockman v. Rathke* case. Finding 36, Resp. A11.

Investigations were performed by various disciplinary authorities and the FBI. Petitioner's allegations were found meritless in each case. 453 N.W.2d at 324; Pet. A33-A34.

Respondent's Petition for Disciplinary Action was filed August 17, 1988, charging Petitioner with violations of Rules 3.1, 8.2(a) and 8.4(d), MRPC. Petitioner filed a lengthy answer. No motion for a more definite statement or to dismiss for failure to state a claim was filed. The hearing took place December 13-15, 1988.

During the referee proceedings, Petitioner softened or retracted the strong language used in many of his allegations while continuing to maintain a conspiracy had existed. However, he expanded his claims against Judge Spellacy, accusing him of perjury and criminal abuse of power, and of seeking to destroy Petitioner both personally and professionally. The remaining facts surrounding the making of these allegations are set out in detail in the Minnesota Supreme Court's opinion in *In re Disciplinary Action Against Graham*, 453 N.W.2d at 316-19 (Pet. A7-A17) and in the referee's Findings of Fact, Conclusions of Law and Recommendation (Resp. A1-A28)

After review of all Petitioner's purported evidence, the referee found that Petitioner's conspiracy allegations:

> [D]id not have a reasonable basis. (Finding 63, Resp. A21)
>
> [W]ere false and frivolous and were made recklessly without regard to their truth or falsity. Respondent's allegations were prejudicial to the administration of justice. (Finding 64, Resp. A21)
>
> [W]ere made without any reasonable basis in fact and without a prudent and complete investigation. (General Findings, Pet. A44)

> [Were] motivated by malice and a desire to retaliate against imagined wrongs. . . . (*Id.*)

The referee found that Petitioner's factual claims against the judges and the county attorney were false statements regarding the integrity of judges and of a public legal officer made with reckless disregard as to their truth or falsity in violation of Rule 8.2(a), MRPC.[1] Resp. A21-A22. He further found that the same claims and those against Milligan were made without basis in fact in violation of Rules 3.1 and 8.4(d), MRPC. *Id.*

The referee recommended that Petitioner be suspended for 60 days, complete the professional responsibility portion of the bar examination within one year, and pay $1,000 in costs. Resp. A23.

The referee's report was issued February 21, 1989, and sent to the Respondent and to Petitioner's counsel, who received it on February 24, 1989. Pet. at 14. Counsel promptly contacted petitioner, then residing in Canada, and discussed the contents of the referee report. Petitioner agreed to enter a stipulation with Respondent consenting to the recommended 60-day suspension. Resp. A39, A41-A42. Neither he nor his counsel ordered a transcript of the referee hearing within ten days of either February 21 or February 24, 1989. Pursuant to Rule 14(e), RLPR, the referee's findings and conclusions became conclusive.

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[1] The referee's Conclusion No. 3 states that the allegations against Magistrate McNulty violated Rule 8.1(a) rather than Rule 8.2(a). Petitioner was not charged with violating Rule 8.1(a), and this citation has been treated as a typographical error. *See In re Disciplinary Action Against Graham*, 453 N.W.2d at 319.

Petitioner later changed his mind and appealed to the Minnesota Supreme Court, lodging most of the same objections found in his petition to this Court. He moved for leave to order a transcript, but did not order one, and moved for summary dismissal. Petitioner also moved for removal of the director of the Office of Lawyers Professional Responsibility as counsel for this case and for his removal from office, alleging yet another conspiracy.

The Minnesota Supreme Court denied Petitioner's motions and held the findings and conclusions to be, with one exception in which Respondent in his brief concurred, conclusive. *In re Disciplinary Action Against Graham*, 453 N.W.2d at 315-16, n.1; Reply Brief of the Director at 31.

The court nevertheless considered Petitioner's claims of defective notice, constitutional privilege, and Rule 8.2(a) construction. The court rejected Petitioner's claim of absolute immunity for baseless court filings. It then agreed that a qualified immunity from discipline could apply, allowing discipline under Rule 8.2(a) only for statements made with the knowledge that they were false or with reckless disregard of their truth or falsity. 453 N.W.2d at 321; Pet. A25. To determine whether statements were made with reckless disregard, the court used an objective standard, rather than the subjective standard used to determine the limits on defamation actions. *Id.* In adopting the objective standard for lawyer disciplinary actions, the court followed the two other state supreme courts which have considered the issue. *Id.*

The Minnesota Supreme Court further determined that service by the referee on Petitioner's counsel satisfied the rule requiring notice of the referee decision. 453 N.W.2d at 315; Pet. A3-A5. Thus, the court determined that discipline was not precluded by any of Petitioner's claims and that the referee's conclusions stood.

The court then addressed the appropriate discipline. The court found Petitioner's continuation and expansion of his various allegations against Judge Spellacy during the disciplinary proceedings and his frivolous motions to remove the director of the Office of Lawyers Professional Responsibility first from the case and then from office to be aggravating factors demonstrating a need to deter future conduct of the same nature. 453 N.W.2d at 325; Pet. A36-A37. The court adopted the referee's recommendation of 60 days' suspension and successful completion of the professional responsibility test. *Id.* On May 1, 1990, the Minnesota Supreme Court denied Petitioner's petition for rehearing.

Petitioner now advances five grounds on which he claims this Court should grant certiorari. They are: that his groundless assertions of fact against two judges, a county attorney and a private practitioner in violation of Rules 3.1, 8.2(a), and 8.4(d), MRPC, are entitled to absolute immunity as petitions to the government; that the same allegations are entitled to qualified immunity judged by a subjective standard, or that use of an objective standard to determine qualified immunity violates due process; that service of the referee report was deficient; that the charging language in the director's petition was defective and therefore denied Petitioner due process; and that he has been disciplined for conduct which

was not the subject of charges, also in violation of due process. Pet. at i-iv.

REASONS TO DENY THE PETITION

A writ of certiorari should not issue because Petitioner has failed to show that there are "special and important reasons" for this Court to grand discretionary review pursuant to Supreme Court Rule 10. He waived most of his purported issues by failing to preserve them below. Even if the issues are considered, however, Petitioner fails to show that the Minnesota decision conflicts with the decision of this or any other state or federal appellate court as required by Rule 10.1(b). He similarly fails to show that the case presents an important question of constitutional law affecting many individuals or otherwise widely applicable, thus not warranting review under Supreme Court Rule 10.1(c).

ARGUMENT

I. THE COURT LACKS JURISDICTION TO HEAR PETITIONER'S CLAIMS OF ABSOLUTE PRIVILEGE, QUALIFIED PRIVILEGE, AND DEFECTIVE CHARGING LANGUAGE.

This Court has no jurisdiction pursuant to 28 U.S.C. § 1257 to review a final decision of a state court unless a federal question has been raised, properly preserved, and decided in the state court below. *Illinois v. Gates*, 462 U.S. 213, 218 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *cf. Bankers Life and*

Casualty Co. v. Crenshaw, 486 U.S. 171, ___ 108 S.Ct. 1645, 1651 (1988). The Court possesses no jurisdiction to hear Petitioner's major claims, which are that the first amendment entitles his conduct to absolute or qualified immunity, or that due process requires application of qualified immunity. The Minnesota Supreme Court's decision on these issues rests on Petitioner's failure to perfect their review under the relevant state procedural rule, an adequate and independent state ground. Jurisdiction is also lacking to review his claim of defective charging language because Petitioner failed to make a timely objection below. The remaining issues are insubstantial and not worthy of the Court's discretionary review.

A. The Minnesota Supreme Court's Decision Rests Upon An Adequate State Ground.

The Minnesota Supreme Court held that the validity of the referee's conclusions that Petitioner violated several disciplinary rules was not properly before the court. The court held those conclusions were not put in issue by Petitioner because he failed to comply with Rule 14(e) of the Rules on Lawyers Professional Responsibility. That rule provides the preconditions for challenging the findings or conclusions in a referee's decision. A party has ten days to order a hearing transcript or the findings and conclusions are conclusive.[2] It is undisputed that Petitioner failed to order a transcript within the time allotted. Pet. at 14.

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[2] Amendments to Rule 14(e), RLPR, effective January 1, 1989, expanded the time for ordering a transcript from five to ten days.

Petitioner concedes that in discussions with his counsel upon receipt of the referee report, he opted not to challenge the referee and instead agreed to settle the matter. *Id*. He agreed to enter a stipulation consenting to the recommended 60-day suspension and in fact signed a proposed stipulation. By letter dated April 18, 1989, nearly two months after the referee's decision, Petitioner first notified the Minnesota Supreme Court and Respondent that he wished to contest the findings and conclusions. Resp. A39-A47. Pursuant to Rule 14(e), however, his opportunity to do so had long since expired. Moreover, despite his expressed desire, motions for permission to order a transcript, and other maneuvers, Petitioner has not to date ordered a transcript. Petitioner has irrevocably waived his right to contest the facts or the violations before the Minnesota Supreme Court.

Since Petitioner's compliance with Rule 14(e) is purely an issue of state law, the Minnesota Supreme Court's decision on the issue is not subject to review in this Court. *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 386, 387 (1986). Moreover, it presents an adequate and independent state ground for the decision. The Court thus has no jurisdiction to review those issues which depend on challenges to the referee's decision. *Id; Webb v. Webb*, 451 U.S. 493, 494 n.4 (1981). The issues conclusively determined against Petitioner on this basis are his claims of absolute and qualified privilege.

Petitioner apparently claims his time for ordering a transcript and thus challenging the findings and conclusions has not yet begun to run. Pet. at 15. He argues that he was never properly notified of the referee's decision pursuant to Rule 14(e), RLPR, and that this Court should

start his appeal time running anew or itself review the evidence supporting the findings. Pet. at iii, 37-40.

The Minnesota Supreme Court held that service by the referee upon Petitioner's counsel satisfied Rule 14(e). 453 N.W.2d at 315-16; Pet. A4-A5. This Court has no jurisdiction to review that court's interpretation of its own rule, another question of purely state law. *See also Hicks on behalf of Feiock v. Feiock*, ___ U.S. ___, 108 S. Ct. 1423, 1428 (1988). Presumably recognizing this, Petitioner characterizes his challenge as a due process claim: The Minnesota Supreme Court's interpretation that service upon counsel is sufficient notice to a respondent attorney allegedly denied him due process.

The contention borders on the absurd. The term "notify" is defined as "to give personal notice *or* to mail to the person at his last known address *or* the address maintained on this Court's attorney registration records." Rule 1, RLPR (emphasis added). In this litigation, the last known address for Petitioner was that of his counsel, so the literal language of the rule was satisfied. Moreover, the Minnesota Rules of Civil Procedure are made applicable to the referee proceedings by Rule 14(b), RLPR, and require service of represented parties to be on the attorney. Minn. R. Civ. P. 5.02; *see also* Minn. R. Civ. App. P. 125.03. Petitioner can claim no due process violation by the Minnesota Supreme Court's application of the rule here.

Just as significantly, Petitioner concedes he had actual notice of the existence and contents of the referee report promptly after its receipt by his counsel. Pet at 14; see also 453 N.W.2d at 315; Pet. A4-A5. Petitioner was

free to request a copy of the report from counsel to make an informed settlement decision. He could have preserved the opportunity to challenge the findings and conclusions by ordering a transcript while settlement negotiations proceeded. He chose not to do either. The actual notice here precludes a due process violation. *See, e.g., National Equipment Rental, Ltd v. Szukhent*, 375 U.S. 311, 315 (1964). Under the circumstances, Petitioner makes no colorable claim on this issue. The Minnesota Supreme Court's decision that he failed to perfect review of the factual findings and legal conclusions stands, and constitutes an adequate state ground for its decision on the issues of absolute and qualified privilege both under the first amendment and as a matter of due process.

B. Petitioner Waived The Opportunity To Object To Purportedly Defective Charging Language When He Failed To Object Prior To The Hearing.

The charges against Petitioner in Respondent's Petition For Disciplinary Action alleged violations of Rule 3.1, 8.2(a) and 8.4(d), MRPC. Petitioner declined to file a motion for a more definite statement pursuant to the applicable rules of civil procedure, move to dismiss, or otherwise formally object to the language of the charges prior to the referee hearing. Indeed in his opening brief to the Supreme Court, Petitioner actually "congratulated" Respondent for "bringing charges in tolerable conformity" with the rules of common law pleading. Resp. A48. In his reply brief, Petitioner then cryptically suggested that he disagreed with the charging language after all. Respondent's [Graham] Reply Brief and Motion For

Summary Dismissal at 13. The court did not address the issue in its opinion or in its denial, without comment, of his petition for rehearing on this ground. Pet. A46.

To be preserved for Supreme Court review, the issue must have been presented to the state court in accordance with state court procedure and ruled on by that court. *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Exxon Corp. v. Eagerton*, 426 U.S. 176, 180, n.3 (1983) (where decision below does not address issue, court will presume because of want of proper presentation unless party affirmatively shows otherwise). The claim was not properly presented, and was in fact explicitly waived, in the Minnesota courts and, consequently, is not reviewable here. The Petition For Certiorari on this issue thus must be denied.

II. THE MINNESOTA SUPREME COURT'S DECISION ON PRIVILEGE DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, OR OTHER STATE OR FEDERAL APPELLATE COURT.

Assuming for the sake of argument the Court finds no jurisdictional bar to review, the petition should nevertheless be denied. Two bases for the grant of certiorari are the existence of a conflict between a decision of the state court and an applicable decision of this Court, or a decision of a federal court of appeals or another state court of last resort. Supreme Court Rule 10.1(b) and (c). In order to demonstrate such a conflict, a petitioner must do more than allege the possibility. A grant of certiorari is justified only by a direct and apparent conflict. No such conflict exists here.

A. This Court Has Held There Is No Absolute Immunity For Petitions To Government.

Petitioner contends that his conduct in filing a disciplinary complaint, a complaint requesting federal prosecution, and an affidavit in a Rule 11 proceeding, all false and frivolous, is entitled to absolute immunity under the first amendment's right to petition government for redress. He claims that decisions of this Court explicitly grant such immunity. These contentions are utterly without merit.

In claiming his statements were absolutely privileged, Petitioner cites three decisions of this Court. Pet. at 25-28. The cases simply do not support Petitioner's argument. The contention was explicitly advanced in a defamation case and was unequivocally rejected by this Court. *McDonald v. Smith*, 372 U.S. 479 (1985) (no absolute immunity under petition clause from libel action for knowingly false allegations made in letters to government officials); *see also Bill Johnson's Restaurants Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983) (baseless litigation not immunized by petition clause). A second case cited by Petitioner held attorneys immune from contempt citations where the truth or falsity of their allegations against a judge was not yet ruled on. *Holt v. Virginia*, 381 U.S. 131 (1965). The third held a petitioner immune from criminal prosecution instituted in retaliation for filing an appeal of another conviction. *Blackledge v. Perry*, 417 U.S. 22 (1972).

The logical leap made by Petitioner, that immunity from criminal prosecution and perhaps contempt citation of necessity applies in attorney disciplinary actions, is not supported by the case law. *See In re Daley*, 549 F.2d 469

(7th Cir.), *cert. denied sub nom. Daley v. Attorney Registration and Disciplinary Commission of Supreme Court of Illinois*, 434 U.S. 829 (1977). Holding compelled testimony admissible over fifth amendment objection in a disciplinary matter, the court there eloquently distinguished between criminal and disciplinary proceedings:

> [A] clear distinction exists between proceedings whose essence is penal, intended to redress criminal wrongs by imposing sentences of imprisonment, other types of detention or commitment, or fines, and proceedings whose purpose is remedial, intended to protect the integrity of the courts and to safeguard the interests of the public by assuring the continued fitness of attorneys licensed by the jurisdiction to practice law.

Id. For this reason, requiring certain basic procedural safeguards in disciplinary actions neither transforms such proceedings into criminal cases nor mandates all due process safeguards. *Id.* at 476, n.1. For example, an overwhelming majority of states, including Minnesota, conduct disciplinary actions using rules of civil procedure and the "clear and convincing" standard of proof. *See In re Gillard*, 271 N.W.2d 785, 805 n.3 (1978) and cases cited therein. The Minnesota Supreme Court's decision denying absolute immunity hence is not inconsistent with existing constitutional or state precedent. *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 625, 654, n. 18 (1985) (limiting *In re Ruffalo*, 390 U.S. 544 (1968), upon which Petitioner heavily relies).

The only state court of last resort addressing discipline for an attorney's false allegations against the judiciary or bar refused to immunize false and baseless

allegations simply because they were contained in a petition for redress. In *In re Belue*, 232 Mont. 365, 766 P.2d 206, 207-08 (1988), an attorney was disciplined under the state's equivalent of Rule 3.1, MPRC, for filing a frivolous disciplinary complaint against opposing counsel alleging the lawyer had bribed a judge. Other state supreme courts have reached conclusions consistent with that in *Belue* and the case before the Court, holding that the first amendment right to freedom of speech provides no absolute immunity for an attorney's unfounded allegations of misconduct by lawyers or judges. *See Matter of Frerichs*, 238 N.W.2d 764, 768 (Iowa 1976); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94 (1979), *cert. denied sub nom. Terry v. Indiana Supreme Court*, 444 U.S. 1077 (1980).

The results in these cases are supported by the reasoning in *McDonald v. Smith*, 372 U.S. at 485, in which this Court refused to grant greater immunity under the petition clause than it did under the speech and press clauses of the first amendment. *See also Milkovich v. Lorain Journal Co.*, ___ U.S. ___, No. 89-645 (June 21, 1990) (rejecting absolute privilege under speech clause for statements of opinion). Thus, though this Court has never addressed the applicability of petition clause immunity in attorney disciplinary proceedings, the Minnesota Supreme Court's decision is completely consistent with other state decisions and with this Court's historic approach. The issue is illusory and the petition should be denied.

B. All Jurisdictions Have Used An Objective Standard To Determine Qualified Immunity In Attorney Disciplinary Proceedings For Statements Made Recklessly.

The contention is similarly advanced that the decision below that Petitioner violated Rule 8.2(a) conflicts

with the subjectively determined qualified immunity from civil liability accorded speech about public figures under *New York Times v. Sullivan*, 376 U.S. 254 (1964).[3] The rule makes it unethical to lodge allegations against the judiciary or other public legal officers known to be false or in reckless disregard of their truth or falsity.

This argument is of no merit and serves only as a prelude for Petitioner's due process claim explored *infra* at II.C. Petitioner cites no precedent applying the standard in attorney disciplinary proceedings rather than defamation actions. In fact, the only state supreme courts which have addressed the issue have explicitly adopted the same objective standard applied here by the Minnesota Supreme Court. *Louisiana State Bar Ass'n v. Karst*, 428 So. 2d 406 (La. 1983) (attorney violated rule prohibiting "knowingly" false accusations against judge, despite "genuine belief" in their truth, because he would have known their falsity in the exercise of ordinary care); *Matter of Terry*, 271 Ind. 499, 394 N.E.2d 94 (1979) (conspiracy allegations against judge and attorneys in letters to government officials not entitled to first amendment protection from discipline because made without reasonable basis).

In adopting the objective standard here, the Minnesota Supreme Court relied on *Terry*, *Karst*, and other cases, noting that the societal interests protected by disciplinary proceedings are entirely different from those

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[3] The contention is not advanced that Rules 3.1 and 8.4(d) are subject to the same subjective standard, nor could it be. *See III, infra.*

served by defamation claims and support a lesser privilege. 453 N.W.2d at 321-22; Pet. A26-27. The reasoning is sound and no court has adopted a contrary approach. Thus, the conflict among jurisdictions or with this Court warranting certiorari is not alleged and certainly not shown.

The two decisions Petitioner cites as supporting his interpretation are in reality not helpful to him. Neither is the opinion of a state court of last resort or a federal appeals court, and neither articulates the rule he would prefer. *Eisenberg v. Boardman*, 302 F.Supp. 1360, 1362 (W.D. Wisc. 1969) (whether attorney's statements about judge can be grounds for discipline "has not been made clear") *State Bar v. Semaan*, 508 S.W.2d 429, 432-33 (Tex. Civ. App. 1987) ("not authoritatively determined"). Even these lower court opinions cannot be said to conflict with the Minnesota Supreme Court's approach here, despite Petitioner's assertion that they do, or should.

In the absence of contrary decisions elsewhere refining the issues, exploring the arguments, and sharpening the debate, certiorari here would lead the court into uncharted territory and a potentially immature decision. The petition hence should be denied.

The Court should note that even if the subjective standard of civil defamation were held applicable, this is not a case in which the statements would be held privileged. The Minnesota Supreme Court reviewed this Court's most recent exposition of the standard, set out in *Harte-Hanks Communications, Inc. v. Connaughton*, ___ U.S. ___, 109 S.Ct. 2678 (1989). *In re Disciplinary Action Against Graham*, 453 N.W.2d at 323, n.7; Pet. A42. The Minnesota

court observed that the Court required more than the bare assertion of "genuine feelings" that statements are true to avoid a finding of reckless disregard. *Id.* The analysis is persuasive and makes it most unlikely that Petitioner's conduct would benefit from the *Harte-Hanks* standard.

In addition, a crucial factual distinction removes all doubt. The newspaper there published an accurate description of the allegations, albeit from an unreliable source. The Court wrestled with whether reckless disregard could exist in such a case. ___ U.S. ___, 109 S.Ct. at 2692-98.

Petitioner's conduct here was not so responsible. His reports were couched in unqualified language and certainty of unlawful conspiracy. He did not report that his "information" was not derived from first-hand knowledge. He did not report that his own informant lacked first-hand knowledge. He did not report that neither Judge Spellacy nor County Attorney Rathke was named by the informant. He did not even provide the minimal qualification of stating he "believed" his allegations to be true. In short, he failed to report what he knew and reported far more than he was told. Under the *Harte-Hanks* precedent, reckless disregard for truth or falsity exists as a matter of law.

C. Use Of The Objective Standard Did Not Deny Petitioner Due Process.

Petitioner's main claim is that, because he tried his case expecting a subjective definition of "reckless disregard," the Minnesota Supreme Court's use of an objective standard denied him due process. Pet. at ii-iii, 35-36. This

Court has considered and rejected the claim that an attorney is entitled as a matter of due process to the interpretation of disciplinary rules alleged by board counsel rather than that ultimately adopted by the state supreme court. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 625, 654 (1985). Moreover, the case cited by Petitioner as setting out the due process requirements for statutory language deals with the ability of a criminal defendant to conform his conduct to reasonable interpretations of the statutory language. *Bouie v. Columbia*, 378 U.S. 347 (1984). Trial strategy is not addressed. The language of the rule here provided all constitutionally-required clarity. The Minnesota Supreme Court's interpretation of its rule is completely consistent with due process precedent from this Court.

III. A DECISION FOR PETITIONER ON THE CONSTITUTIONALITY OF USE OF AN OBJECTIVE STANDARD UNDER RULE 8.2(a), MRPC, WILL NOT AFFECT THE OUTCOME OF THIS CASE.

Petitioner's primary challenge is to the conclusion that he violated Rule 8.2(a), MRPC. The referee held and the Minnesota Supreme Court affirmed that Petitioner violated the rule in three ways: by his false allegations made with reckless disregard of their truth or falsity regarding the integrity of Judges Spellacy and McNulty, and his false, reckless allegations regarding a public legal officer, County Attorney Rathke. Petitioner claims the first amendment dictates that the courts below erred in using an objective standard to determine reckless disregard under Rule 8.2(a), and that his "feelings" that his claims were true entitle him to qualified immunity under

the subjective standard he prefers. In the alternative, Petitioner claims he was entitled to use of a subjective standard as a matter of due process since he believed that was the appropriate test. Assuming *arguendo* Petitioner is correct in one of these claims, it would not affect the result in this case because Petitioner's same acts were held to result in four violations of two other disciplinary rules.

The referee found and the Minnesota Supreme Court affirmed that Petitioner's false and unfounded assertions of fact in court filings under oath against all four targets constituted frivolous pleadings without basis in fact under Rule 3.1, MRPC, and conduct prejudicial to the administration of justice in violation of Rule 8.4(d). The Minnesota Supreme Court used objective standards in applying both rules. 453 N.W.2d at 324; Pet. A33. That approach is consistent with its prior cases and the treatment of similar rules in other jurisdictions. *See, e.g., In re Tieso,* 396 N.W.2d 32 (Minn. 1986) (federal court claims, ruled frivolous under objective standard of Federal Rule of Civil Procedure 11, also violated Rule 3.1, MRPC); *Disciplinary Proceedings of Phelps,* 637 F.2d 171, 176 (10th Cir. 1981) (objective standard explicitly employed in determining whether to discipline for affidavit lacking factual foundation); *Matter of Frerichs,* 238 N.W.2d 764, 767 (Iowa 1976) (attorney's allegations against judges was conduct prejudicial to the administration of justice despite his asserted subjective intent because of effect of claims on public's belief in integrity of courts).

Indeed a holding that Rule 3.1 incorporates or must incorporate a subjective standard would eviscerate not only that rule, but its kin in related areas of the law. For

example, Federal Rule of Civil Procedure 11 and many state rule cognates incorporate almost verbatim the language of Rule 3.1, MRPC.[4] No court, including this one, has suggested that *conduct* in filing frivolous or prejudicial allegations receives first amendment protection because of statements contained therein.

Under the circumstances, then, the Court will not change the holding that Petitioner engaged in unethical behavior warranting discipline by granting review of the application of Rule 8.2(a) and first amendment privilege below. The petition thus should be denied.

IV. PETITIONER'S REMAINING CLAIMS ARE INSUBSTANTIAL.

A. The Charging Language Was More Than Sufficient Under Prior Holdings From This Court.

Should the Court reach Petitioner's claim of defective charging language, it will find the argument meritless. Petitioner claims he was held in violation of Rules 3.1 and

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[4] Rule 11 provides in relevant part that an attorney's signature on a court filing constitutes certification that:

> to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. . . .

8.4(d), MRPC, without having been so charged, in violation of due process. Pet. at iii, 40. This allegation is simply false.

Paragraphs A through S of the Petition For Disciplinary Action, which Petitioner chose not to include in his Appendix, set out the factual predicates stating the claims against Petitioner. Resp. A29-A36. The violations allegedly resulting from the conduct described were then stated in four counts in paragraphs T through W. Pet. A47-A49. Both rules were cited in each charge. *Id.* This language was sufficient under existing case law to notify Petitioner of the charges against which he was required to defend. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process requires only that complaint give notice reasonably calculated to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections); *In re Wright*, 131 Vt. 473, 310 A.2d 1, 9 (1973) (complaint in attorney discipline proceeding sufficient if it fairly notifies the respondent of the nature of the misconduct charged, meaning the factual matters upon which evidence will be presented); *In re Krehel*, 419 Pa. 86, 213 A.2d 375, 378 (1965) (same).

Petitioner nevertheless claims due process requires that the "operative language" of each rule must be quoted in the charge, and that the charges here were not so worded. Pet. at iii, 40-41. No decision of this or any other court has ever required that a complaint quote or paraphrase the statute to which it refers. Petitioner's claim is wrong as a matter of law. It is also wrong as a matter of fact, since paragraphs T through W recite that Petitioner's allegations were made "without basis in fact"

or "without basis other than Alderman's report." This language expressly invokes Rule 3.1, and is not contained in Rule 8.2(a). Even if Petitioner's claim were correct, then, the discipline stands because two of the three rules are quoted in part in the charges.

The charging document here, taken as a whole, satisfies the notice requirement on its face. Moreover, Petitioner in fact defended against the Rule 3.1 and Rule 8.4(d) allegations in the proceedings below. His briefs address those claims, particularly the 8.4(d) issue, at length. Brief of Respondent [Graham] to Referee at 26-31; Respondent's [Graham] Reply Brief to Referee at 1-2, 5-9. He actually complimented Respondent on the drafting of the charges in his brief to the Minnesota court. Resp. A48. Petitioner raises no colorable due process claim here and the Court's exploration of the issue is thus not needed.

B. Petitioner Was Not Disciplined Based On Uncharged Conduct.

Petitioner claims he has been disciplined based on conduct and statements which were not the subject of formal charges, again in violation of due process. Pet. at iii-iv, 41-42. This claim is simply false.

The Minnesota Supreme Court determined to discipline Petitioner based on the formal allegations charged in the director's Petition for Disciplinary Action. 453 N.W2d at 324; Pet. A32-A34. After affirming the referee's conclusions that Petitioner committed several rule violations by his conduct filing two complaints and one federal court affidavit, the Court considered the appropriate

sanction. 453 N.W.2d at 324-25; Pet. at A34-37. It reviewed four relevant cases in which discipline ranged from an admonishment through suspension and disbarment. *Id.* To make its decision here, the Court looked for evidence in mitigation or aggravation of the misconduct. It found aggravating factors in Petitioner's continuing and accelerating claims of criminal conduct against Judge Spellacy during the disciplinary proceedings, as well as his frivolous motions against the director. Because the Court saw in Petitioner's conduct before it a continuing need to deter him from future unfounded and reckless conspiracy allegations, it found a reprimand insufficient and instead adopted the recommended 60-day suspension. 453 N.W.2d at 325; Pet. A37.

Factors in aggravation or mitigation are routinely considered in determining the sanction in attorney disciplinary matters and, for that matter, in criminal sentencings after a finding of guilt. *See, e.g., In re Ackel*, 155 Ariz. 34, 745 P.2d 92, 99-100 (1987); *In re Reback*, 513 A.2d 226, 231 (D.C. Cir. 1986). The *Ackel* court used prior uncharged complaints in aggravation and held due process was satisfied. 745 P.2d at 96. No court has suggested that a tribunal must ignore the conduct occurring in its presence in determining a sanction designed to protect the public and the court system. While there may someday be a case for the Court to review the due process parameters of use of aggravating factors in a discipline case, this is clearly not the one.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition be in all respects denied.

Dated: July 9, 1990.

Respectfully submitted,

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FILE NO. C3-88-1760

STATE OF MINNESOTA

IN SUPREME COURT

In Re: Petition for Disciplinary Action against JOHN REMINGTON GRAHAM an Attorney at Law of the State of Minnesota	FINDINGS OF FACT CONCLUSIONS OF LAW AND RECOMMENDATION

This matter came on for hearing on December 13, 14, and 15, 1988, before the Honorable Paul Hoffman acting as referee by appointment of the Minnesota Supreme Court. Attorneys William J. Wernz, Esq., and Betty M. Shaw, Esq., represented the Office of the Director of Lawyers Professional Responsibility. Douglas W. Thomson, Esq., represented respondent. Respondent was personally present throughout the proceedings. At the outset of the hearing, respondent confirmed that his use of phrases like "appears to be correct' [sic] in responses to requests for admission could be taken as equivalent to admissions. Upon the consideration of the exhibits, testimony, briefs and arguments of counsel and all of the files and records herein the referee makes the following:

FINDINGS OF FACT

Background

1. Respondent John Remington Graham has been a licensed Minnesota attorney since 1967.

2. For a portion of his professional career, respondent was a professor at Hamline Law School. He has authored books and articles in a variety of disciplines.

3. Respondent practiced law in Brainerd, Minnesota from 1981 until August 1988, when he moved to Quebec, Canada where he presently resides. While respondent was in Brainerd, there arose substantial personal and political ill-will between he and Stephen Rathke. This continued through all of the times involved in this matter.

Shockman Assault Charge

4. On September 21, 1987, Michael Shockman struck his 7 year old son Shane on the face causing facial bruises. On September 25, 1987, police officers of the City of Brainerd investigated a report from elementary school personnel about Shane's facial bruises and placed Shane in protective custody (Dir. Ex. 1C).

5. On about September 26, 1987, Michael and his wife Sherry Shockman consulted with and retained respondent in connection with their son's removal and placement in protective custody. On September 28, 1987, Shane was returned to his parents (Dir. Ex. 8, Vol. 1, pp. 77-81).

6. On October 1, 1987, respondent wrote to Crow Wing County Board member Mary Koep. In this letter (Dir. Ex. 1B), respondent recounts a number of custody and child protection cases in Crow Wing County, many of which did not involve the county or Crow Wing County Attorney Stephen Rathke. Shane Shockman's protective custody was referred to in page seven of the letter, but

the Shockmans were not identified by name (Dir. Ex. 1B). On page eight of the October letter, Graham criticizes Rathke for actions which only indirectly related to Shockmans and of which the Shockmans were not aware (Dir. Ex. 8, Vol. 2, p. 32). The references to the Shockmans (p. 7) ascribe wrongdoiong [sic] to the municipal police and "commendable maturity" to the assistant county attorney (Dir. Ex. 1B).

7. On October 9, 1987, upon the complaint of Brainerd policemen and with the agreement of Rathke, Assistant Crow Wing County Attorney Susan J. Hudson signed a misdemeanor complaint charging Michael Shockman with fifth degree assault (Dir. Ex. 1C). The complaint was signed after Rathke attended a public meeting at which respondent's October 1 letter to Koep was hotly discussed (Dir. Ex. 9J, p.4.).

8. On October 21, 1987, respondent as attorney of Michael, Sherry and Shane Shockman, filed a federal court complaint against Rathke seeking to enjoin the prosecution of Michael Shockman on the basis that Rathke had commenced the prosecution in retaliation for respondents' October 1, 1987, letter (Dir. Ex. 1). There was extensive local publicity about these matters.

Shockman Grand Jury

9. On or about October 30, 1987, Rathke contacted district court judge John Spellacy and gave him notice that he was requesting the convening of a grand jury to consider whether Michael Shockman should be indicted for fifth degree assault. In addition to the Shockman

matter, the petition invited the grand jury to "inquire into the decision making process which gave rise to the criminal complaint" (Dir. Ex. 9J, attachment C).

10. On November 3, 1987, Judge Spellacy signed an order convening a new grand jury panel before which Rathke had not previously appeared. The Judge appointed Aitkin County Attorney John Leitner as special prosecutor after determining that Leitner had not talked with Rathke and had no prior knowledge of the *Shockman* case (Spellacy and Leitner testimony).

11. On November 4, 1987, Judge Spellacy instructed the grand jury either to indict or return a no bill for Michael Shockman, Stephen Rathke, assistant county attorney Susan Hudson and assistant county attorney Pamela O'Rourke. He also instructed the grand jury that they had the right to inquire into other crimes but were not to "go off on a witch hunt." (Dir. Ex. 10A, pp. 65-66). Judge Spellacy did not instruct the grand jury to consider criminal defamation charges against respondent (Dir. Ex. 10; Resp. Ex. Item 108; Spellacy testimony).

12. On November 4, 1987, after instructing the grand jury, Judge Spellacy met with respondent and Leitner in chambers. After explaining his denial of respondent's motion to have the Crow Wing County Attorneys removed from the grand jury's consideration, Judge Spellacy informed respondent that allegations made in his October 1, 1987, letter which was attached to the petition for the callng [sic] of a grand jury, might constitute criminal defamation for which respondent could himself be indicted (Dir. Ex. 10B, p. 71). On November 8 respondent wrote a letter (Dir. Ex. 23D) on this

subject. On November 10, in chambers Judge Spellacy, respondent, Rathke and Leitner discussed the November 8, letter and the subject of criminal defamation. Rathke stated his view that the law would not support such a charge (Dir. Ex. 10C).

13. On November 10, 1987, Leitner on his own initiative inquired of the grand jury if any wished to hear about the law of criminal defamation as part of their deliberations. Leitner had not presented evidence to the grand jury with a view to obtaining an indictment against respondent. Leitner presented the law on criminal defamation to the grand jury for the purpose of allowing them to consider whether to hear more testimony. The grand jury, after hearing the law on criminal defamation, determined not to consider the matter further (Leitner testimony; Dir. Ex. 10E, p. 34; Resp. Ex. Item 108).

14. On November 10, 1987, the grand jury returned an indictment against Michael Shockman for assault in the fifth degree and returned no bills with respect to Rathke, Hudson and O'Rourke. At Leitner's suggestion the grand jury also returned a no bill with respect to respondent (Dir. Exs. 10D; 10E, p. 35).

15. Judge Spellacy, Rathke and Leitner did not have any off the record contact with the Shockman grand jurors (testimony of Spellacy, Rathke and Leitner).

16. Rathke testified that Judge Spellacy, sometime after November 4, mentioned to him that respondent could possibly be indicted for criminal defamation. Judge Spellacy testified that he does not recall making that comment (testimony of Rathke and Spellacy). No one took any action in response to the statement. Rathke

repeated what he understood Spellacy to have said, to his partners and other Brainerd lawyers. The Shockman matter was the subject of much discussion, gossip and publicity in Brainerd.

17. Judge Spellacy testified that he spoke with Leitner on November 9 in Aitkin about respondent's November 8, 1987, letter and asked him to be present for a conference on November 10. Leitner testified that he did not recall any conversation with Spellacy on November 9 (testimony of Spellacy and Leitner).

December 9, 1987, In Chambers Meeting

18. On the morning of December 9, 1987, respondent, Rathke and Rathke's attorney Michael Milligan appeared in federal court before Magistrate Patrick J. McNulty in Duluth on respondent's motion for a temporary injunction in *Shockman v. Rathke*. No formal hearing was held on the motion for a temporary injunction. Instead, both counsel agreed to an expedited trial on the suit for permanent injunction, beginning January 4, 1988, with Magistrate McNulty acting as a federal district court judge. No record was made of the December 9 proceedings.

19. Respondent's motion for leave to file an amended or supplemental complaint was opposed by Rathke in a memorandum but was not discussed at the chambers meeting with McNulty on December 9 (Dir. Ex. 9K). The motion was "overlooked", and McNulty wrote to counsel on Decembefr [sic] 10, 1987, granting respondent's motion for an amended or supplemental complaint (Dir. Ex. 9N). On December 9, 1987, there was no defense

motion to dismiss plaintiffs' case pending before McNulty (Dir. Ex. 9K).

20. The proceedings and results of December 9, provided no sufficient basis for respondent's later descriptions, for example, that:

> "The judge had indicated preliminary approval of the suit. The evidence seemed reasonable. The law . . . seemed reasonable. . . . [McNulty] suggested clearly enough that the matter might have real merit. . . . [and] clearly enough hinted he was going to give my clients . . . relief pendente lite."

(Dir. Ex. 23SA, pp. 5-6.)

21. On about December 22, 1987, Milligan filed an answer to the amended complaint on Rathke's behalf alleging that respondent, as plaintiffs' counsel, had violated Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. § 549.21 and asserting that Rathke was entitled to attorney fees, costs and disbursement (Dir. Ex. 9P, par. XII).

January 4-6, 1988 Trial

22. *Shockman v. Rathke* was tried before Magistrate McNulty on January 4, 5, and 6, 1988, in Duluth. Nothing in the trial transcript supports respondent's allegations that "Milligan was offensive, arrogant, overconfident and ruthless. He seemed to know what was going to happen before it happened." (Dir. Exs. 8; 23A, p. 7).

23. Judge McNulty conducted the trial in a fair and judicial manner. The transcript of the federal trial indicates his consistency and even-handedness and does not

indicate an abrupt change of attitude by Judge McNulty from his December 9, 1987, position (Dir. Ex. 8).

24. Nothing in the trial transcript supports respondent's allegations that "Judge McNulty was exceedingly biased. His attitude toward me [Graham] was hostile, sometimes he was insulting and rude. He gave carte blanche to Mr. Milligan. He gave the impression that his mind was made up before he walked into the courtroom." (Dir. Exs. 8; 23A, p. 7). Neither the federal trial transcript nor Judge McNulty's findings indicate anything approximating the "seething hatred" for respondent to which respondent testified before this referee (Dir. Exs. 2; 8).

25. Respondent has repeatedly stated, as one of three "mainstays" of proof of conspiracy, McNulty's purported abrupt change of attitude between December 9 and January 4. (*E.g.*, Dir. Ex. 23A, p. 17). This "mainstay" is completely unproven and contrary to the evidence. No one should have relied on it.

26. Milligan's January 8, 1988, written argument in *Shockman v. Rathke* (Dir. Ex. 9V) was reasonably made in support of his affirmative request for attorney fees pursuant to Rule 11 and does not constitute a "bizarre procedural irregularity," as respondent has claimed (Dir. Exc. [sic] 9P; 9V). Respondent has alleged that Milligan's purported post-trial improprieties were a second "mainstay" of the conspiracy proof. There is no such proof, the evidence is to the contrary and no one should have relied on it.

27. McNulty found in favor of defendant Rathke and took under advisement the request for assessment of attorney fees (Dir. Ex. 9BB). A review of the federal court

file and transcript indicates that the ruling was appropriate and based on the law and the facts. There was no appeal. McNulty's decision to take the matter of attorney fees under advisement was properly within his discretion.

December 11, 1987, Christmas Party and Alderman Report

28. On December 11, 1987, Brainerd attorney Bruce Alderman and his wife attended a Bar Association Christmas party. Mr. and Mrs. Alderman sat at a dinner table with members of Rathke's law firm including Mr. and Mrs. Charles Steinbauer, Mr. and Mrs. Stephen Rathke, Mr. and Mrs. Patrick Krueger, and Mr. and Mrs. Thomas Borden (testimony of Alderman, Charles Steinbauer and Lois Steinbauer). The Steinbauers and Aldermans were seated next to each other near an end of the table. The attorneys except Mr. Alderman were drinking alcoholic beverages (Dir. Ex. 35, p. 81).

29. Alderman has had good professional relationships with the Rathke firm members, but is not a social friend of any of them. Alderman has had a long and cordial relationship with Graham, but is not a close friend. (Alderman testimony).

30. The *Shockman v. Rathke* trial was a major topic of conversation at the Christmas party (testimony of Alderman, Steinbauer and Krueger; Dir. Ex. 35, p. 14). At some time during that evening, Alderman apparently understood someone to be making a statement referring to the *Shockman v. Rathke* case, to the effect that Milligan had telephoned another person who in turn called the judge

in Duluth and that "everything had been taken care of", "was in the bag", or words to that effect (Dir. Ex. 35, p. 15). Alderman's later accounts of what he heard vary from each other in certain respects. For example, he apparently told the FBI he could not remember any names being used (Dir. Ex. 35G, pp. 27, 31).

31. The conversation lasted approximately 10 to 30 seconds. Alderman was uncertain who made this statement at the Christmas party, but believes it was very probably Steinbauer, or possibly Krueger (Alderman testimony). Alderman did not believe the speaker was drunk or joking, but he did not know what to make of the statement (Dir. Ex. 35, pp. 48, 51). He later characterized the statement as "loose party talk." (Dir. Ex. 25G, p. 30).

32. During dinner on December 11, 1987, Lois Steinbauer heard her husband Charles discuss respondent in the context of the *Shockman v. Ratnke* lawsuit, and heard him made [sic] a statement to the effect that Graham was becoming more paranoid and the next thing he might do is claim there is a fix in with the judge (Lois Steinbauer testimony and affidavit attached to Dir. Ex. 26). No one else heard either the statement Alderman heard or the one Lois Steinbauer heard. Charles Steinbauer does not recall making either statement.

33. In early January 1988 Alderman had a conversation with a distant relative, James Wieland, about the Shockman trial. Alderman then told Wieland what he had heard at the Christmas party on December 11 and asked him not to repeat it (Dir. Ex. 35, p. 26; Alderman testimony).

34. On about January 25, 1988, Wieland had a conversation with respondent regarding the *Shockman v. Rathke* trial. During that conversation Wieland repeated to respondent what Alderman had told him (Dir. Ex. 28, pp. 12-13).

35. On about January 28, 1988, respondent met with Alderman, at respondent's request, for about an hour to an hour and a half to discuss what Alderman had heard at the Christmas party. During that conversation, respondent attempted to steer Alderman into saying that the reported middleman in the conspiracy (who reportedly called McNulty) was Judge Spellacy (Alderman testimony; Dir. Ex. 37, p. 38).

36. At no time did Alderman indicate that Judge John Spellacy was or could be the individual Milligan purportedly called (Alderman testimony; Dir. Ex. 35, pp. 29, 31-32). Alderman told respondent, " . . . that as far as I was concerned, he [Spellacy] was not involved." *Id* at 29. Alderman did not tell respondent that he had heard that the "middleman" was a judge or that political or DFL party connections were mentioned in the conversation which he heard on December 11 (Alderman testimony). Alderman did not hear nor did he tell respondent that Rathke's name was mentioned (Alderman testimony; Dir. Ex. 35; p. 33).

Graham's Allegations

37. Respondent testified before this referee that his log, (Director's Exhibit 3A, "Evidence of Improper Influence Exerted in the Case of Michael Shockman v. Stephen

Rathke") contained all of the material facts and circumstances that formed the bases for his allegations. Other than what Alderman told respondent of what he believed he heard on December 11, the log does not contain any evidence of a conspiracy.

38. On February 16, 1988, respondent wrote to United States Attorney Jerome Arnold alleging that "at the request of Mr. Rathke" Milligan had contacted Judge Spellacy who contacted Magistrate McNulty, obtaining McNulty's commitment to decide *Shockman v. Rathke* "without regard to the law and the facts." Respondent also alleged that Milligan, Rathke and Spellacy committed several felonies and that Charles Steinbauer had committed a felony (Dir. Ex. 3). Respondent testified that Steinbauer's "gloating" and "internally approving" of others' acts, and his not reporting them, constituted federal crimes (Dir. Ex. 37, pp. 65-67). Respondent later acknowledged that it was possible Rathke had not made a "request" to fix the case at all, but had instead "acquiesced" in a fix secured by others (Dir. Ex. 37. pp. 62-63). There was no reasonable basis for these allegations in respondent's log or elsewherre [sic].

39. In the "log" which accompanied respondent's February 16, 1988, letter to Mr. Arnold, respondent stated that the Shockman grand jury was impanelled for the secret purpose of indicting him for criminal defamation (Dir. Ex. 3A, p. 5). Respondent repeated this allegation at numerous times, some under oath, including before this referee. (Resp. testimony, Dir. Ex. 24).

40. Respondent based this claim in part on Charles Warnberg's report of a remark by attorney Richard Breen

(Dir. Ex. 3A, p. 5). Respondent did not ask Breen about his statement to Warnberg or otherwise investigate the basis for Breen's statement (Resp. testimony). Breen had no independent knowledge or information regarding the purpose of the Shockman grand jury, (Breen testimony).

41. Respondent based his allegation regarding the Shockman grand jury in part on James Wieland's alleged report that Judge Michael Haas was warning respondent that Rathke was attempting to use the Shockman grand jury "to get . . . me into trouble" (Dir. Ex. 3A, p. 5). In fact, Wieland did not tell respondent that Judge Haas ever tried to warn respondent about the purpose of the grand jury (Dir. Ex. 28, p. 11). Respondent did not talk to Judge Haas about the purported warning or otherwise investigate the "warning" (Resp. testimony). On November 4 to November 11, 1987, Judge Haas had no information on the purpose of the grand jury nor did he attempt to warn respondent about the purpose of the grand jury (Judge Haas testimony).

42. Respondent's testimony indicated no substantial reason for his failure to speak with Breen or Judge Haas before reporting their alleged statements as a basis for respondent's allegations (Resp. testimony; Dir. Ex. 23A, p. 25). His failure to do so is one example of his recklessness. There is no reasonable basis to believe the Shockman grand jury was impanelled for the secret purpose of indicting respondent. (Resp. Ex. Item 108; testimony of Leitner, Spellacy and Rathke).

43. Respondent reported to Arnold through the log that attorney Richard Aretz told him that "disciplinary action will probably be forthcoming in at least one case

[of judicial misconduct complained of by Graham] . . . and that he [Aretz] is learning with the progress of his investigation that 'Mr. Rathke is up to his neck in all of ths [sic].' " (Resp. Ex. Item 5, p. 14). Aretz did not make any such statements to respondent (Aretz testimony).

44. On March 22, 1988, respondent filed with Donald P. Lay, Chief Judge of the Eighth Circuit, United States Court of Appeals, a complaint of judicial misconduct against Magistrate McNulty signed under oath stating "of his certain knowledge" that Magistrate McNulty "was corruptly influenced . . . by means of political connections and illicit persuasion" to decide *Shockman v. Rathke* "without regard to the law and the facts. . . . " Respondent also alleged that Judge Spellacy "using his long established political connections and friendships as the *modus operandi*" obtained Magistrate McNulty's commitment to decide against the Shockmans. Respondent further alleged in his March 22 complaint "it was in fact known to Mr. Rathke, Mr. Milligan, Judge McNulty and others how the case would be decided some three weeks before the opening of trial on January 4, 1988, all as a consequence of corrupt influence . . . " (Dir. Ex. 4) These statements were false.

45. At trial, respondent testified that by "political" he meant "old boy influence peddling" not just organized political party connections (Graham testimony). Respondent's allegations that Spellacy influenced McNulty in this way are also false. Respondent also testified that by "certain knowledge," he meant several things, including "belief" and "great probability." Respondent is a learned and intelligent attorney, capable of using words according to their normal meanings. In these and other

instances he either chose not to do so or, when confronted by evidence, to try to explain away his specific claims.

46. On or about March 24, 1988, respondent through counsel filed an affidavit in federal district court in connection with a motion for Magistrate McNulty to disqualify himself from considering the attorney fees matter in *Shockman v. Rathke*. The affidavit included the following statement under oath:

> . . . I state of certain knowledge that the following events have occurred to wit: [a] state district judge in response to the request of Mr. Milligan contacted the said Judge McNulty and secured from him a commitment to decide this case against the plaintiffs and additionally to assess attorney fees against me. All of this was done with the knowledge and consent of Mr. Rathke and certain other persons. A commitment by said Judge McNulty was accordingly made fully three weeks before the beginning of trial on January 4, 1988.

(Dir. Ex. 5). These statements were false. Considerable publicity followed the filing of respondent's March 24 affidavit. Respondent's complaint against McNulty also became the subject of publicity (Dir. Ex. 6D; Resp. Exs. Items 41-42).

Other Purported Conspirators, Conspiracies and Improprieties.

47. In respondent's March 22 complaint and his March 24 affidavit, respondent stated of his certain knowledge that the acts of fixing the federal case were done "with the knowledge and consent" of certain "others." In respondent's sworn statement on May 13,

1988, he identified those others as Steinbauer, Krueger, Borden and unnamed members of Milligan's law firm. Respondent stated that "surely Krueger knew . . . and if Krueger knew it, it is impossible to believe Borden didn't know about it." He also stated " . . . the proof also includes that there are certainly other members of Milligan's law firm that knew about this." (Dir. Ex. 37, pp. 117, 119). Respondent's allegations that Krueger, Borden and members of Milligan's firm knew about the alleged conspiracy are false. Before this referee respondent testified, in effect, that he had no knowledge that any "others" were involved.

48. In letters to the Director's Office and at trial under oath, Graham alleged that John Leitner perjured himself regarding his presentation of the matter of criminal defamation to the grand jury in November 1987 (Dir. Exs. 26C, p. 2; 26D, p. 3; 26G, p. 3; Graham testimony). There is no reasonable basis for such an allegation (Leitner testimony; Dir. Ex. 10).

49. In letters to the Director, respondent expanded his allegations against Judge Spellacy to include perjury, deliberate falsehoods and criminal abuse of official power (Dir. Exs. 26A, p. 2; 26B, p. 2; 26D, pp. 2-3; 26H, pp. 3-4). At trial, respondent alleged that Judge Spellacy not only sought to have the *Shockman v. Rathke* case dismissed but also to have respondent destroyed personally and professionally through the imposition of attorney fees (Graham tesimony [sic]). These additional allegations are false, and there was no rational basis for these allegations.

50. In letters to the Director (Dir. Exs. 26G; 26 H), which respondent designated as "of record," and in an affidavit (Resp. Ex. Item 97), respondent accused the Director of misconduct in conducting the disciplinary investigation by issuing charges against him on testimony the Director knew to be perjured and by breaking his word to respondent by seeking to have the trial moved from Brainerd to Little Falls, Minnesota. Respondent also alleged that Rathke was responsible for having the trial scheduled in Little Falls (Dir. Ex. 26G, p. 8). At the hearing respondent withdrew his allegations regarding the reasons for the movement of the trial to Little Falls (Graham testimony). Respondent admitted he had not read two letters from the Director's Office to this referee (with copies to respondent's counsel) in which requests were made for the trial to be held in Brainerd (Dir. Exs. 27; 17A). There is no basis for respondent's allegations that the Director or his Office committed acts of prosecutorial misconduct in this matter.

51. In an October 24, 1988, letter to the Director's Office, respondent alleged the words which had not been spoken were inserted into the Shockman grand jury transcript (Dir. Ex. 26A, p. 3). Respondent withdrew this allegation at trial (Graham testimony).

52. The foregoing allegations by respondent of other conspirators, conspiracies, crimes and improprieties were made recklessly and without rational basis. They show respondent's continuing propensity for such reckless charges.

Relationships and Activities of Alleged Conspirators.

53. Respondent alleged the purported conspiracy occurred between about noon on December 9, 1987, and the early evening of December 11, 1987 (Dir. Exs. 3, p. 1; 4, p. 1; 5, p. 2; 37, pp. 23, 88). After evidence tending to refute this claim was marshalled, respondent attempted to enlarge the timeframe. This enlargement depended on the alleged conspirators' confidence that McNulty would be corrupted, although on December 11, he had not yet been contacted. Respondent at trial exclaimed, "Sure!" when asked whether such confidence in the corruptibilty of a federal judicial officer would be warranted. In making his allegations respondent acted in part on his unsupported belief in the case and prevalence of judicial corruptibility. On December 9, 10 and 11, 1987, Patrick McNulty was in Duluth, Minnesota (testimony of Miller and McNulty; Dir. Ex. 7EE).

54. On December 9 and 10, Judge Spellacy was in St. Paul, Minnesota attending a judges' conference. On December 11 Judge Spellacy attended a meeting in the morning in St. Paul, drove to Brainerd to check on the return of a grand jury which Rathke was conducting, and returned to Grand Rapids by 3:00 p.m. where he conducted a telephone arraignment for the County Attorney in Walker, Minnesota (Spellacy testimony; Dir. Exs. 7C; E; F; G). Spellacy did not talk with Rathke about the Shockman matter on December 11 or at any time before he testified on January 4, 1988 (testimony of Spellacy and Rathke).

55. On December 9, 1987, following the hearing in Duluth, Milligan returned to St. Cloud. Milligan was in

St. Cloud on December 10 and 11 (Milligan testimony; Dir. Ex. 32, pp. 29-30). Milligan did not talk with Spellacy about the Shockman trial prior to Spellacy's testimony on January 4, 1988 (testimony of Spellacy and Milligan).

56. Following the hearing in Duluth on December 9, Rathke returned to Brainerd. On December 10, Rathke conducted a grand jury until mid-afternoon, then drove with Sheriff Frank Ball to the Twin Cities where he attended a meeting of the Minnesota Sentencing Guidelines Commission. Rathke and Spellacy stayed at the same hotel in St. Paul on December 10 but they did not speak with each other. Spellacy's ignorance of Rathke's whereabouts is evidenced by his call from St. Paul to Rathke's home in Brainerd the morning of December 11. Early on the morning of December 11, Rathke returned to Brainerd with Sheriff Ball where he conducted the grand jury proceeding (Rathke testimony; Dir. Ex. 7Z). Spellacy and Rathke spoke once or twice around noon, in Brainerd, about grand jury matters unrelated to Shockman (testimony of Rathke and Spellacy).

57. At no time during the period December 9 through 11, 1987, was Patrick McNulty in the same city with Stephen Rathke, Michael Milligan or Judge Spellacy (testimony of McNulty, Spellacy, Rathke, Miller and Milligan). Exhaustive production of telephone records and testimony show that Michael Milligan, Stephen Rathke and Judge Spellacy did not telephone McNulty or communicate with McNulty between December 9 and 11, 1987, or at any other time prior to the *Shockman v. Rathke* trial (Dir. Ex. 7; testimony of Spellacy, Milligan, Rathke, McNulty and Miller).

58. Judge Spellacy and Patrick McNulty attended the University of Minnesota Law School at or about the same time from about 1946 through 1948. Before testifying in *Shockman v. Rathke* in January 1988, Spellacy had not seen McNulty or talked to him since 1974. Spellacy and McNulty were not social friends at any time (testimony to Spellacy and McNulty). When Spellacy appeared in court on January 4, 1988, McNulty stated on the record: "Unfortunately this Court is not equipeed [sic] with trumpets or I'm sure they would have sounded when Judge Spellacy walked in." (Dir. Ex. 8, Vol. 1, p. 192).

59. Prior to his appointment Judge Spellacy was an active member of the DFL party. Since Spellacy's appointment to the bench he has not been politically active. Prior to his appointment as a bankruptcy referee and magistrate, McNulty had been an active member of the DFL party. Since his appointment he has not been politically active. Spellacy and McNulty did not work on campaigns together and had no "political connections" other than activity in the same party.

60. Judge Spellacy met Michael Milligan in 1976 when Milligan became an assistant county attorney in Cass County and Judge Spellacy was sitting in Walker on a regular basis. Milligan is a conservative Republican (Milligan testimony). Graham has been active in the DFL party (Graham testimony). Prior to his testimony in the *Shockman v. Rathke* trial in January 1988, Spellacy had last seen Milligan about May 1, 1986.

61. Prior to the chambers meeting on December 9, 1987, Patrick McNulty had never met Stephen Rathke or respondent (testimony of Rathke and McNulty). Neither

McNulty nor Milligan specifically recall having met before that date (testimony of Milligan and McNulty). However, Milligan may have appeared before McNulty in the late 1970's in bankruptcy court (Milligan testimony).

62. Stephen Rathke did not request Michael Milligan to corruptly influence Judge McNulty. Michael Milligan did not call Judge Spellacy or any other judge or any other person and request that person to contact Patrick McNulty to influence his decision in *Shockman v. Rathke*. Judge Spellacy did not contact or attempt to influence Judge McNulty. Judge McNulty was not corruptly influenced to decide *Shockman v. Rathke* on a basis other than the law and the facts. Charles Steinbauer did not know or approve of a conspiracy to obstruct justice in the *Shockman v. Rathke* matter.

63. Respondent did not have a reasonable basis for asserting allegations of conspiracy in the *Shockman v. Rathke* matter.

64. Respondent's allegations of conspiracy, including those quoted herein, were false and frivolous and were made recklessly without regard to their truth or falsity. Respondent's allegations were prejudicial to the administration of justice.

Based on the foregoing, the referee makes the following:

CONCLUSIONS OF LAW

1. Respondent's statements and allegations in findings 38, 39, 44, 45, 46 and 49 are false statements regarding the integrity of a judge, made without basis and fact

and with reckless disregard to the statements' truth or falisty, [sic] in violation of Rules 3.1, 8.2(a) and 8.4(d), Rules of Professional Conduct.

2. Respondent's statements in findings 38, 39, 44 and 46 are false statements concerning the integrity of a public legal officer, made without basis and fact and with reckless disregard as to the truth or falsity of the statements, in violation of Rules 3.1, 8.2(a) and 8.4(d), Rules of Professional Conduct.

3. Respondent's statements in findings 44 and 46 under oath and as of his "certain knowledge" that Magistrate McNulty participated in a conspiracy to prejudice the *Shockman v. Rathke* case are false statements regarding the integrity of a judge, made by respondent without basis other than the report of Bruce Alderman, and with reckless disregard as to the truth or falsity of the statements, in violation of Rules 3.1, 8.1(a) [sic] and 8.4(d), Rules of Professional Conduct.

4. Respondent's statements in findings 38, 44 and 46 that Milligan participated in a conspiracy to prejudice the *Shockman v. Rathke* case are false statements made by respondent without basis other than the report of Bruce Alderman, and made with reckless disregard as to the truth or falsity of the statements, in violation of Rules 3.1 and 8.4(d), Rules of Professional Conduct.

RECOMMENDATION

Respondent testified that he is "proud" of what he has done. His allegations of further conspiracies and

improprieties during the proceedings show he has a propensity to continue his reckless behavior. He has no discipline record.

This referee recommends that respondent be suspended from the practice of law for 60 days; that the reinstatement hearing provided for in Rule 18(a) through (d), RLPR, be waived; that respondent successfully complete the professional responsibility portion of the state bar examination within one year of the date of his suspension; and that respondent pay $1,000 in costs pursuant to Rule 24(a) plus disbursements pursuant to Rule 24(b), RLPR.

The attached memorandum is to be considered a part of these Findings, Conclusions and Recommendation.

Dated this 21st day of February, 1989.

Respectfully submitted,

/s/ Paul Hoffman
PAUL HOFFMAN
SUPREME COURT REFEREE

MEMORANDUM

The referee is completely satisfied that respondent made false and damaging statements concerning two judges, a public official and many attorneys. The referee is further satisfied that these statements were made without any reasonable basis in fact and without a prudent and complete investigation. It further appears that, at least in part, respondent was motivated by malice and a desire to retaliate against imagined wrongs directed at himself. At best, respondent took a scrap of cocktail party

conversation and extrapolated it to form an unsubstantiated hypothesis. Few attorneys would have such a sense of self-importance as to think that two judges and many attorneys would conspire in order to defeat them on a relatively minor case. Respondent did feel this way, and the referee is satisfied that his feelings were genuine.

The facts are clear. The real question is whether or not respondent's various statements were protected in some manner.

Respondent raises five basic defenses:

1. An attorney has a duty to report professional misconduct by a judge or by another attorney.

2. Respondent had a First Amendment right to criticize public officers and to expose judicial corruption.

3. The statements made by respondent were true; and that if some of the statements are determined to be false, respondent was not aware of such falsity and they were not made recklessly.

4. The statements were not "published".

5. The statements were privileged.

These will be discussed in order.

1. Duty to Report.

"Whenever there is proper ground for serious complaint against a judge, it is the right and duty of a lawyer to submit his grievances to the proper authorities." *Owen v. Carr*, 497 NE2d 1145, 1149 (Ill. 1986). This statement is

typical of the comments made in cases from many jurisdictions. It was, and appropriately so, cited in respondents brief. Such cases taken with the U.S.C., the Code of Judicial Conduct, and the Rules of Professional Responsibility made it clear that in proper cases report should be made.

The Illinois Court stated the general rule well, "Whenever there is *proper ground* for *serious* complaint." (emphasis supplied). The findings in this case that the statements made were untrue or recklessly made shows that there was not a "proper ground" nor a basis for a "serious" complaint.

2. First Amendment.

Protection in both civil and criminal cases has been established in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); and subsequent cases. However, the United States Supreme Court has extended protection to false statements, "except the knowing or reckless falsehood." *Garrison* at 215.

The findings are that the statements were made recklessly.

3. Statements Were True.

As the findings demonstrate, most of the statements were based on conjecture and were untrue. Bruce Alderman certainly believed that he had heard Steinbauer say something to the effect that Milligan had called someone who had called the judge in Duluth and that everything

was taken care of. Alderman characterized the remark as "loose party talk". (Dir. Exh. 25G, p. 4). Alderman never connected Judge Spellacy with the remark. Judge Spellacy's name was quite familiar to Alderman, who would have almost certainly remembered it if it had been mentioned by Steinbauer.

Graham then added Spellacy, Rathke and others to the alleged conspiracy. Once Spellacy was included, Graham added political connections and old-boy friendship as the basis for McNulty's agreement to "fix" the case. None of these additions and embellishments are supported by facts.

Graham argues that statements made by Richard Breen (through Charles Warnberg); Judge Haas (through James Wieland) and Richard Aretz factually support his statements. The testimony was otherwise. Breen said he had no information of his own. Judge Haas testified that he had no knowledge and made no attempt to warn Graham, as claimed. Aretz denied the statements attributed to him in Graham's log.

The final "mainstay" of Graham's proof are his claims of an abrupt change of attitude by Judge McNulty and the "bizarre procedural irregularities indulged in by Milligan and allowed by McNulty." The record does not support these claims as being either accurate or factual. The referee has read the entire transcript of the *Shockman v. Rathke* trial. Judge McNulty was extremely fair to both parties. The patience and courtesy shown Graham almost certainly exceeded what would have been extended by most judges. Judge McNulty's rulings were based upon the law and nothing else.

4. Statements Not Published.

Rule 8.1 does not include a necessity for "publication". Exhibit 5 was made a public document by its filing. In addition, Graham made his statements to a number of people.

5. Statements Were Privileged.

Although factually different, these cases are significant: *In re Tieso*, 396 NW2d 668 (Minn. 1987); and *In re Williams*, 414 NW2d 394 (Minn. 1987). In each of these cases, an attorney was disciplined for conduct involving disruption of proceedings, prejudicing the administration of justice, or making frivolous claims.

Respondent could have submitted to appropriate persons or bodies the exact factual information he possessed. Basically that would be a precise report as to what Alderman said of the Steinbauer conversation. Respondent's exaggerated embellishments, without reasonable foundation, are the vice here.

DISCIPLINE RECOMMENDATION

Case law in this area concerning punishment extends from admonitions, *In re Frerichs*, 238 NW2d 764 (Iowa 1976) to disbarment, *Matter of Terry*, 394 NE2d 94 (Ind. 1979), although the attorney in *Terry* had a substantial prior misconduct record. The parties, in their respective briefs, have cited a great number of cases. It appears appropriate here to recommend a relatively short suspension.

Counsel for both the respondent and the director have been most helpful with their thorough briefs. Although few cases are cited in this memorandum, the referee has carefully considered all of the arguments and has read a majority of the cases cited.

/s/ Paul Hoffman
Paul Hoffman

FILE NO. ___

STATE OF MINNESOTA

IN SUPREME COURT

In Re Petition for Disciplinary Action against JOHN REMINGTON GRAHAM, an Attorney at Law of the State of Minnesota.	PETITION FOR DISCIPLINARY ACTION

TO THE SUPREME COURT OF THE STATE OF MINNESOTA:

The Director of the Office of Lawyers Professional Responsibility, hereinafter Director, files this petition, upon the parties' agreement, pursuant to Rules 10(a) and 12(a), Rules on Lawyers Professional Responsibility (RLPR). The Director alleges:

The above-named attorney, hereinafter respondent is, and has been, since October 20, 1967, admitted to practice law in Minnesota. Respondent has paid through March 31, 1989, the registration fee required by Rule 2, Rules for Registration of Attorneys. Respondent most recently practiced law in Brainerd, Minnesota. Respondent recently moved to the province of Quebec, Canada.

Respondent has committed the following unprofessional conduct warranting public discipline:

FIRST COUNT

A. On September 25, 1987, police officers of the City of Brainerd investigated a matter involving facial bruises of a seven year old boy, Shane Shockman. The investigation indicated that on September 21 Shane's father, Michael Shockman, had struck him on the face. Shane was placed in protective custody from September 25 until September 28.

B. On October 9, 1987, upon the complaint of a Brainerd policeman and with the agreement of Crow Wing County Attorney Stephen Rathke, Assistant Crow Wing County Attorney Susan J. Hudson, signed a misdemeanor complaint, alleging assault in the fifth degree against Michael Shockman.

C. On October 21, 1987, John Remington Graham, as attorney for Michael, Sherry, and Shane Shockman, filed a federal court complaint against Stephen Rathke, seeking to have the prosecution of Michael Shockman enjoined. The complaint alleges that Rathke commenced the prosecution to retaliate for a letter dated October 1 which Graham sent to the County Board. A copy of the complaint, with Exhibits A, B (the October 1 letter) and C (the criminal complaint against Shockman) thereto is attached as Exhibit 1. The October 1 letter recounted a number of custody and child protection cases in Crow Wing County, most of which did not involve the County or Rathke. Shane Shockman's protective custody was referenced on page 7 of the letter.

D. On or about October 30, 1987, Rathke contacted District Court Judge John A. Spellacy and gave notice that he was requesting the convening of a grand jury to

consider whether Michael Shockman should be indicted for the assault of Shane. Judge Spellacy promptly convened the grand jury and appointed Aitkin County Attorney John Leitner as special prosecutor before the grand jury. In addition to the Shockman matter itself, the grand jury was asked to consider whether Rathke and two assistants may have acted criminally in charging Shockman.

E. On November 4, 1987, during a meeting in chambers, at which Graham and Leitner were present, Judge Spellacy (while explaining his denial of Graham's motion to have the Crow Wing County attorneys removed from the grand jury's consideration) informed Graham that the allegations Graham made in his October 1 letter, if false, might constitute criminal defamation.

F. The Shockman grand jury met and heard testimony on November 4, 5, 6 and 10, 1987. The grand jury returned an indictment against Michael Shockman for assault in the fifth degree. The grand jury returned no bills with respect to Rathke, Hudson, Pamela Sellnow O'Rourke (another assistant county attorney) and Graham.

G. On the morning of December 9, 1987, Graham, Rathke, and Rathke's attorney, Michael T. Milligan, appeared in federal court before Magistrate Patrick J. McNulty in Duluth, on Graham's motion for temporary injunction. Then, or shortly thereafter, Magistrate McNulty made orders reflecting the parties' agreement upon several matters: to trial beginning January 4, 1988, on the complaint for permanent injunction; to proceed before Magistrate McNulty; and to allow amendment of

the *Shockman v. Rathke* complaint to take into account the grand jury indictment.

H. On or about December 22, 1987, Milligan filed an Answer to Amended Complaint upon Rathke's behalf, and stated therein that defendant,

> Affirmatively alleges plaintiffs [sic] counsel has violated Rule 11 of the Minnesota Rules of Civil Procedure as well as Minn. Stat. 549.21 and therefore, this answering defendant is entitled to attorneys fees, costs and disbursements in this matter.

I. The *Shockman v. Rathke* suit was tried before Magistrate McNulty on January 4, 5 and 6, 1988, in Duluth. On January 21, 1988, Magistrate McNulty issued his findings of fact, conclusions of law and order (Exhibit 2). Judgment for defendant was ordered. No appeal was taken. In addition, the court specifically retained jurisdiction to consider the application for attorney's fees. An order was also issued regarding the procedure for determining whether attorney fees and costs would be awarded on Rathke's application.

J. On or about January 25, 1988, Graham spoke with a friend, James Wieland, who told Graham that a Brainerd attorney, Bruce Alderman, had stated to him that in December 1987 he had heard a law partner of Stephen Rathke indicate that the *Shockman v. Rathke* case was "set," and that Rathke would win.

K. On January 28, 1988, Graham asked Bruce Alderman to come to Graham's office to discuss the matter. Alderman told Graham that on December 11, 1987, he attended a Bar Association Christmas party, and sat at a table with Rathke and Rathke's law partners and their

spouses. Alderman told Graham that one of Rathke's partners, probably Charles Steinbauer, made a statement which gave Alderman the impression that Milligan had telephoned someone who in turn called Magistrate McNulty and as a result of this telephone conversation, " . . . everything had been taken care of or it was in the bag, or words to that effect." Although Rathke's partner reportedly mentioned the name of the person Milligan reportedly called, Alderman said he either did not recognize the name or forgot it before speaking with Graham. Alderman also understood Rathke's partner to have said it was his opinion that attorney's fees would be awarded against Graham. Alderman made no reply to Rathke's partner, and the entire conversation on the reported discussions on the Shockman matter lasted between 10 and 30 seconds. Alderman told Graham that he did not believe Rathke's partner was drunk or jesting, but that Alderman did not take the statement "as absolute fact."

L. During the January 28 meeting, Graham repeatedly inquired and suggested to Alderman that the person Milligan reportedly called was Judge Spellacy. Alderman told Graham he did not know whether the person Milligan reportedly called was reportedly a judge or not. Alderman told Graham, " . . . that as far as I was concerned, he (Judge Spellacy) was not involved." Graham asked Alderman repeatedly " . . . if it was Judge Spellacy and I [Alderman] said I didn't agree that it was."

M. Alderman does not believe that the name Stephen Rathke was mentioned to him on December 11 in connection with the conversation with Rathke's partner about the *Shockman v. Rathke* litigation. Mr. Alderman's memory of his conversation with Rathke's partner does

not include any mention by Rathke's partner that the person who reportedly called Magistrate McNulty had political connections with Magistrate McNulty. Alderman does not believe that anyone else heard this conversation with Rathke's partner, and Alderman did not discuss it with anyone except Wieland and Graham until after January 28, 1988. After January 28, Graham did not again discuss the matter with Alderman until April 19.

N. On February 16, 1988, Graham wrote to United States Attorney Jerome Arnold, alleging that "at the request of Mr. Rathke" Milligan had contacted Judge Spellacy who contacted Magistrate McNulty, obtaining McNulty's commitment to decide *Shockman v. Rathke* "without regarding to the law and facts." *See* Exhibit 3. Graham alleged that Milligan, Rathke and Spellacy thereby committed several federal felonies. Graham further alleged that Steinbauer committed certain felonies. Graham also enclosed with his letter to Arnold a document he prepared, called "EVIDENCE OF IMPROPER INFLUENCE EXERTED IN THE CASE OF MICHAEL SHOCKMAN V. STEPHEN RATHKE, NO. CV-5-87-260," a copy of which is attached hereto as Exhibit 3A. Exhibit 3A contains essentially everything which Graham regarded as forming the evidentiary basis for his allegations of February 16 and his statements of March 22 and 24, 1988 (see paragraphs P. and Q. below).

O. On March 17, 1988, Graham wrote to Arnold, correcting his February 16 letter regarding the dates of the alleged conspiracy, now stating it occurred between December 9 and December 11, 1987.

P. On or about March 22, 1988, Graham filed with the Chief Judge of the Eighth Circuit United States Court of Appeals, Donald P. Lay a complaint of Judicial Misconduct Against Magistrate McNulty, a copy of which is attached as Exhibit 4. In the complaint, signed under oath, Graham stated "of his certain knowledge" that Magistrate McNulty "was corruptly influenced . . . by means of political connections and illicit persuasion" to decide *Shockman v. Rathke* "without regard to the law and the facts. . . . " Graham also alleged that Judge Spellacy, "using his long established political connections and friendship as the modus operani," obtained Magistrate McNulty's commitment to decide against the Shockmans.

Q. On or about March 24, 1988, Graham filed in federal district court, in connection with a motion for Magistrate McNulty to disqualify himself from considering the matter of attorney's fees in *Shockman v. Rathke*, an affidavit alleging that Milligan, Rathke, and an unnamed "state district judge" (by which Graham meant Judge Spellacy) conspired with Magistrate McNulty to decide the *Shockman* case against the plaintiffs and assess attorney's fees against Graham. *See* Exhibit 5. The allegations of conspiracy were prefaced by Graham's representation, " . . . I state of certain knowledge that the following events have occurred to wit:. . . . " Magistrate McNulty later disqualified himself from considering the question of assessing attorney fees against Graham, on the basis that a complaint of judicial conduct was pending. Exhibits 4 and 5 were the subjects of newspapers articles.

R. Judge Spellacy filed a complaint of unprofessional conduct against Graham. *See* Exhibit 6. Graham filed a complaint of judicial misconduct against Judge Spellacy,

and complaints of unprofessional conduct against Milligan, Rathke and Steinbauer. In investigating these complaints against attorneys, the Office of Lawyers Professional Responsibility took sworn statements from Alderman, Magistrate McNulty, Milligan, Steinbauer, Rathke, Graham, Patrick Krueger (another of Rathke's partners), James Wieland, Charles Warnberg, Kevin Spellacy (Milligan's partner and Judge Spellacy's son), John Leitner and Judge Spellacy. Other witness statements have also been taken informally, and the interview records of the FBI have been obtained. Inasmuch a the alleged conspirators reside in different cities, the Director's Office has also obtained certain telephone and travel records of various persons and offices. By agreements and waivers, these statements and records have been made available upon request to those complained of, as well as to the Eighth Circuit and the Board on Judicial Standards.

S. By documents mailed July 5, 1988, Graham was informed of the Director's determination that discipline was not warranted on his complaints against Rathke, Milligan and Steinbauer. The Director's Office also sent Graham a letter on July 5 advising him of the opportunity to review the determinations and evidence the Director would make available to him, so that he could determine whether to re-affirm, modify or retract his conspiracy allegations. At earlier times during the investigation, Graham and others had also been advised of the availability of the Director's evidence file for their review, and Graham did review some of the evidence then available.

CHARGES

T. Graham's statements in Exhibits 3, 4 and 5, that Judge John A. Spellacy (referred to as a "state district judge" in Exhibit 5) participated in a conspiracy to prejudice the *Shockman v. Rathke* case, by using purported "political connections," by purportedly "making prejudicial remarks [to Magistrate McNulty] about the suit and counsel bringing it for the plaintiffs," and otherwise are false statements regarding the integrity of a judge, made without basis in fact and with reckless disregard to the statements' truth or falsity, in violation of Rules 3.1, 8.2(a) and 8.4(d), Rules of Professional Conduct.

U. Graham's statements in Exhibits 3, 4 and 5, that a conspiracy arose to prejudice the *Shockman v. Rathke* case "at the requests of Stephen Rathke" and with the "knowledge and consent of Stephen Rathke" are false statements concerning the integrity of a public legal officer, made without basis in fact and with reckless disregard as to the truth or falsity of the statements, in violation of Rules 3.1, 8.2(a), and 8.4(d), Rules of Professional Conduct.

V. Graham's statements in Exhibits 4 and 5, under oath and as of his "certain knowledge", that Magistrate Patrick J. McNulty participated in a conspiracy to prejudice the *Shockman v. Rathke* case are false statements regarding the integrity of a judge, made by Graham without basis other than the report of Bruce Alderman, and made with reckless disregard as to the truth or falsity of the statements in violation of Rules 3.1, 8.2(a) and 8.4(d), Rules of Professional Conduct.

W. Graham's statements in Exhibits 4 and 5, under oath and as of his "certain knowledge", that Michael

Milligan participated in a conspiracy to prejudice the *Shockman v. Rathke* case are false statements made by Graham without basis other than the report of Bruce Alderman, and made with reckless disregard as to the truth or falsity of the statements in violation of Rules 3.1 and 8.4(d), Rules of Professional Conduct.

WHEREFORE, the Director respectfully prays for an order of this court imposing appropriate discipline, awarding costs and disbursements pursuant to the Rules on Lawyers Professional Responsibility, and for such other, further or different relief as may be just and proper.

Dated: August 17, 1988.

/s/ Wm. J. Wernz
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JOHN REMINGTON GRAHAM
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180 Haut de la Paroisse
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April 18, 1989

Hon. Glen E. Kelly
Justice of the Supreme Court
St. Paul, Minnesota 55155

Re: Matter of John Remington Graham, No. C3-88-1760

Dear Sir,

I am the respondent in the above-entitled disciplinary matter. On February 23, 1989, the referee entered findings and recommendations in this matter.

Immediately upon learning of the referee's determination, I contacted my counsel, Douglas W. Thomson, Esq., of St. Paul. He explained the general tenor of the referee findings, although these were not then in my possession, and we discussed the matter.

I stand accused in writing, as set forth in parts T, U, V, and W of the petition, of making certain false accusations of public wrongdoings, these made in solemn form, against two judges and two lawyers, with reckless disregard for the truth. I have not been prosecuted for anything other than what I said in my letter of February 16, 1988, to the United States Attorney in Minnesota, pursuant to 18 U.S.C., Section 4, which is exhibit 3 attached to the petition, – what I said in my complaint of March 22, 1988, before the Judicial Council of United States Court of Appeals for the 8th Circuit, pursuant to 28 U.S.C., Section 372(c), which is exhibit 4 attached to the petition, – and what I said in my affidavit of March 24,

1988, filed before the United States District Court in Duluth, in support of a motion of my counsel, under 28 U.S.C., Section 455, which is exhibit 5 attached to the petition. There is no evidence on this record showing, and, as I have recently learned, the referee did not make a finding that I did anything other than transmit exhibits 3 and 4 on a confidential basis according to law and file exhibit 5 in the public depository which is designated by law for such purpose.

My view of the facts of this case are recited in the 59-page summary of evidence attached as an appendix to the final argument of my counsel before the referee, submitted on January 6, 1989. My view of the law is stated with excellence in the final argument of my counsel. My story is supplemented by my answers to prehearing interrogatories and requests for admissions. The director was given an opportunity to respond to this summary of evidence, and he expressly declined to do so. Since this summary recited facts from documents, depositions and testimony of record, quoting relevant language in extenso whenever possible, the particulars are not really capable of serious dispute. This summary and my responses to discovery requests are my answer as to what happened.

The only questions, as far as my counsel and I could see, were whether, given the accusations pleaded, and the manner in which the documents in question were transmitted or filed, as under absolute privilege, – and then, assuming I was not protected by absolute privilege in some degree, whether to that extent the referee findings were sustainable in law, – and, again assuming I was not protected by absolute privilege, whether to that extent I acted unprofessionally.

The referee findings, as they were explained to me, appeared to be so far from the truth that it seemed I was caught up in an irrational situation, from which I could not extricate myself by way of further litigation without taking risks I should prefer to avoid.

In conferring with my lawyer, therefore, it seemed that the best course, if possible, would be to settle this matter, and let time pass, while I live with my family in Canada, until things can be understood in a clearer light, as I am sure they will be one day. I have in my career so long weathered insults and so often suffered blows for being right, only to be vindicated after the passing of some years, that this experience of being denounced again would be tolerable, though undeniably difficult.

The referee recommended that I be suspended for 60 days and pay $1000 in costs. I asked my lawyer if he could negotiate a settlement, submitting to the 60-day suspension and payment of costs, so as to get this situation behind me. Mr. Thomas assured me that he could, and, not because I think the findings are even remotely sustainable in any objective view of the applicable law, but in an effort to be as practical as possible, and in the knowledge of time as mistress of the truth, I asked him to settle. A few days later, Mr. Thomson and I spoke again, and he advised me the matter had been settled, and that an order of suspension and following restatement should be matters of routine. I have no doubt that this is what he thought. He told me that a stipulation would shortly arrive.

On March 23, 1989, a stipulation arrived, but the terms were very far from what I understood was agreed

upon, significantly because it called on me to agree that, even though I had never been served with the findings and had never read them, the referee findings were conclusive and incontestable, when, given what I even then knew, they were are [sic] false and/or misleading and/or irrelevant and/or prejudicial, as to every material point, as can be easily demonstrated from the record of this case, and papers in the hands of the director, – it provided that I should, in addition to paying costs as agreed, pay an unspecified amount of disbursements, which, as far as I knew, might be nominal or crippling, – it appears to state the recommendations could be arbitrarily set aside by the court, this after I had already made an agreement which was arbitrarily set aside by the referee, only to be attacked with unbecoming appeals to prejudice because of my protests, – it required that I admit this was all in my best interests, when I have every reason to believe the effect will harm the independence of the bar, – my proper name was mischaracterized by a term of political ridicule, – and my counsel was listed as the respondent, while I was listed as counsel for the respondent.

I redrafted the stipulation, so as to remove all objectionable language, but restating the bare terms agreed upon, as I understood them, including everything necessary to permit an order suspending me for 60 days and commanding me to pay $1000 in costs. I signed the instrument, and dispatched it to my lawyer in the Canadian mails on March 24, 1989. I spoke with my counsel as soon as possible after the document had been mailed, and explained the situation. Mr. Thomson believed the revisions, as I explained them to him by telephone, did not seem to be problematic, since I was not trying to escape

punishment, but, on the contrary, was trying to get the ordeal over with. I have been informed by Mr. Thomson that Mr. Wernz protests the redrafted stipulation. That, as far as I am concerned, must terminate the negotiations, and I wish to take this matter before the court, having no real choice, since I cannot enter into another agreement on which I cannot safely rely as to its fulfillment.

I made several requests of my counsel for a copy of the referee findings. I do not doubt that he believed a copy had been sent to me. When he learned that, for one reason or another, I had not received a copy, he had a copy sent to me under a cover letter of April 6, 1989, which I received in her Majesty's mails on April 11, 1989, and of which I enclosed a photocopy. On April 11, 13, and 15, 1989, I wrote and dispatched letters to Mr. Thomson, stating my objections to the referee findings, – directing my counsel to order a transcript, – and explaining my view of why the ten-day time period could not have run in this matter, it being undeniable that, due to circumstances beyond my control, I did not lay eyes on the referee findings before April 11, 1989.

The referee findings are even more objectionable than I I [sic] had previously understood them to be, among other things, in that there is nothing in them which even remotely suggests that, as to the three documents which are the entire basis of the charges against me, I did anything but transmit and file them according to law, – and in that they find me guilty, contrary to any fair view of the record, of claimed misconduct with which I was never charged in writing, and for which, therefore, I was not properly tried.

Especially because I am pressed by extremely short time constraints, and also because schedule and distance make rapid communication difficult, I am writing you to advise that I have asked Mr. Thomson to order a transcript in my behalf. I should have contacted the court reporter myself, so as to be as sure as possible of an order being made, but I do not have his name, address, and telephone. I have, in any event, done everything humanly possible to save my rights.

By dispatching a copy of this letter to him, I am giving Mr. Thomson the option of withdrawing as my counsel. I am doing this, expressly acknowleging [sic] the very fine quality of his services, and thanking him profusely for his assistance during this very trying time for me and my family. He has been kind enough to charge a fee which, though respectable, was only a fraction of what he was entitled to receive. If the settlement had been possible, then I should have considered us square.

However, because of the continuing demands of Mr. Wernz for terms of capitulation which, under the circumstances, are dishonorable – I should disassociate myself from the bar of this court before signing a paper effectively admitting patent falsehoods and failing to uphold the independent right of lawyers – it is, in my view, unfortunate but evident that further litigation will be necessary. Given my responsibilities to my wife and to my five children, including a teenager who will soon be entering his university years, I am unable to consecrate further resources to pay Mr. Thomson a fee commensurate to his worth, and, while there is some ambiguity in our understanding as to how far he is obligated to serve me, I should never think of straining my relationship

with him by pushing too far, or exposing him to unfair risks, and, therefore, I am giving him the option of withdrawal with the assurance of cordial gratitude from me and my family.

I engaged counsel and tried to settle out of respect for this court as an institution, – seeking, if possible, to avoid unnecessary agitation or embarrassment over a matter which has become rather too sensitive, – and attempting, if it could be done without humiliation, to display good citizenship by submitting to a judgment entered within jurisdiction, however much I disagreed with it. These prospects now appear to be lost hopes, and if I must fight it out alone, then so be it.

I request to be advised of a schedule for preparing submissions. It appears, however, that there are to [sic] preliminary questions which must be addressed before going to the merits.

One of these I presume, will be the question of whether the referee findings [sic] "conclusive" as Mr. Wernz is fond of calling them. I maintain that the time has not run and the rule relied upon is either void on its face, or void as applied, or construable in my favor. If Mr. Wernz wishes to contest this point, as I anticipate he may wish to do, I suggest that the point be be [sic] argued and decided before the main questions are addressed.

The second of these arises from my desire to secure an order removing Mr. Wernz from prosecuting in this matter, and appointing a special prosecutor with discretion to review the file and take such action as be believes is appropriate. There are certain public documents which,

I think, show that Mr. Wernz has an unwholesome personal involvement in this matter, and the equivalent of conflicts of interest. I want these documents to be brought to the attention of the court, not for the purpose of prejudicing the rights of Mr. Wernz as to any claim of deficiency in his conduct, but to show that he has no business acting as prosecutor in his [sic] matter, by reason of various considerations, including some of his acts during the hearing in Little Falls.

I desire the order schedule of submissions to include provision for a forthcoming motion for an order directing Mr. Wernz to step down from this case. I should, of course, expect that a special prosecutor be appointed to serve in his place: I have no objection whatever to making answer as against any proper accusation against, or proper inquiry into my conduct as a lawyer. This has always been my policy.

Perhaps you will recall, in the Shockman matter, I was happy to step aside in favor of Mr. Villaume, but Mr. Rathke refused, then he had to be ordered off, and it was then, not before, that it became possible to settle the case quickly and effortlessly, and the reason was, as Judge Baland found, Mr. Rathke had a personal involvement which distorted his perspective. I believe I can show that precisely the same situation exists here.

I must, in any event, be informed of the name, address, and telephone of the court reporter, so that I can complete my arrangements with him. I request also that I be supplied with a list of the exhibits of Mr. Wernz. There is substantial overlap in his and my exhibits, but I want to be sure of his system of identification.

In your order, I request that you specify the number, form, and other requisites of submissions.

If your office staff wish to communicate with me by telephone to expedite matters, my telephone is [sic] Quebec is 418-888-5049.

Respectfully yours,

/s/ John Remington Graham

Copies to Messrs. Wernz and Thomson

No. C3-88-1760

STATE OF MINNESOTA

IN THE SUPREME COURT

In the Matter of Disciplinary Action against John Remington Graham, Attorney at Law of the State of Minnesota,

Respondent

RESPONDENT'S BRIEF AND APPENDIX

* * *

It should not be necessary to remind anyone that lawyer discipline proceedings are civil in form, – actually they are a species of suits in equity on scire facias –, but they are quasi-criminal or penal in nature. And in all such prosecutions, a respondent is entitled to due process in many ways comparable to what must be accorded defendants in criminal cases. He must be accused in terms of ultimate facts, in separate counts, substantially in accordance with the principles of common law pleading. *The respondent congratulates the director in having had the courtesy of bringing charges in tolerable conformity with these rules.* The director has specified exhibits 3, 4, and 5 (Appendix, pp. A4-A13). The respondent holds him to those documents, and moves that everything said about him but not strictly pertaining to those documents be altogether stricken and expunged from this record (emphasis supplied).

* * *